cause, the Respondent solely asserted that the petition should be dismissed as untimely filed.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed for the first time a one-year statute of limitations on petitions for writs of habeas corpus filed by state prisoners. *See* Antiterrorism and Effective Death Penalty Act, Pub.L. 104-132, 110 Stat. 1214 (1996). In most cases, the limitations period begins to run when the judgment becomes final after direct appeal or the time for seeking such review has expired. 28 U.S.C. § 2244(d)(1)(A).[4] This period is tolled while a properly filed application for State post-conviction relief or other collateral

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scan or brain scan of Petitioner which would have convinced the trial court to allow an insanity defense; and (b) failed to request a psychological evaluation of Petitioner at or about the time Petitioner pled guilty.

[4] The statute provides that the limitations period shall run from the latest of –

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

review with respect to the pertinent judgment or claim is pending.[5] 28 U.S.C. § 2244(d)(2).

The judgment of conviction and sentence in the underlying criminal case became final at the latest on November 13, 2001, 90 days after the convictions were affirmed on direct appeal. *Bond v. Moore*, 309 F.3d 770, 773-74 (11th Cir. 2002) (holding that when a petitioner is entitled to file a petition for a writ of certiorari in the United States Supreme Court the statute of limitations under 28 U.S.C. § 2244(d) does not begin to run until this 90-day window has expired). *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1986) (holding that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied); Supreme Court Rule 13.1 (providing that a petition for writ of certiorari must be filed within 90 days of the date of the entry of the judgment by a state court of last resort). Therefore, the Petitioner's federal petition for a writ of habeas corpus challenging his convictions was required to be filed on or before November 13, 2002, unless the limitations period was extended by a properly filed application for state post-conviction relief or other collateral review proceedings. *See* 28 U.S.C. § 2244(d)(2).

Since the Petitioner's federal petition for a writ of habeas corpus challenging his convictions was not filed

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[5] A properly-filed application is defined as one whose "delivery and acceptance are in compliance with the applicable laws and rules governing filings," which generally govern such matters as the form of the document, the time limits upon its delivery, the court and office in which it must be lodged and the requisite filing fee. *Artuz v. Bennett*, 531 U.S. 4 (2000).

until May 4, 2004, well beyond one year after the date on which his conviction and sentence became final, the petition was time-barred pursuant to 28 U.S.C. § 2244(d)(1)(A) unless the limitations period was extended by his state motion for post-conviction relief. *See* 28 U.S.C. § 2244(d)(2). As previously explained, Petitioner pursued state post-conviction relief. However, his attorney did not file his state motion for post-conviction relief until after the applicable one-year limitations period had already expired. For this reason, the District Court ruled that Petitioner's habeas corpus petition was untimely and was barred by the applicable limitations period. (App. 5). *See* 28 U.S.C. § 2244(d). *See also Tinker v. Moore*, 255 F.3d 1331, 1332 (11th Cir. 2001) (holding that a state petition filed after expiration of the federal limitations period cannot toll the limitations period because there is no period remaining to be tolled).

(ii) Petitioner's Attorney's Misconduct and the Court's Ruling That This Did Not Justify the Application of the Doctrine of Equitable Tolling

Prior to ruling that Petitioner's federal petition for a writ of habeas corpus was time barred, the District Court entered an Order requiring the Petitioner to address the applicability of the limitations period to his habeas corpus petition. Petitioner subsequently filed pleadings in the District Court addressing the limitations issue with numerous supporting documentary exhibits. In those pleadings, Petitioner argued that the limitations period should be equitably tolled because he diligently attempted to comply with the statute of limitations governing federal habeas corpus claims but, as a result of his attorney's misconduct, he did not do so.

Documents attached to those pleadings established that Petitioner's untimely filing of his habeas corpus petition was the result of his attorney's misconduct. More specifically, on November 13, 2001, the day that Petitioner's judgment of conviction and sentence became final, Petitioner retained an attorney, John Lipinski, to represent him for the purpose of filing his state motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 and to pursue federal habeas corpus relief pursuant to 28 U.S.C. § 2254. That same day, the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1) began to run. Therefore, Lipinski needed to file Petitioner's state motion for post-conviction relief before November 13, 2002 so as to toll that limitations period.

On February 25, 2002, Petitioner wrote to Lipinski and stated, *inter alia*, as follows:

> I would like for all my legal avenues and trial errors to be considered and me not be deprived of any one of them because of the time limitation.
>
> I also would like to inform you that I was never provided with any records from my criminal case by either of my attorneys who represented me, for which I am entitled to have. I would appreciate you sending me a copy of everything that you obtain through the courts, or trial attorneys, discovery, depositions, plea agreement and any and all motions, etc.[6]

Lipinski did not respond to this letter of the Petitioner.

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[6] This document and all correspondence between Petitioner and Lipinski referred to herein were affixed as supporting documentation to Petitioner's "Memorandum Justifying Consideration of Petition for Writ of Habeas Corpus" filed in the District Court under docket number 8.

On May 2, 2001, Petitioner's sister and brother-in-law met with Lipinski and were assured that he was working on Petitioner's state motion for post-conviction relief. On May 6, 2002, Petitioner again wrote to Lipinski and stated, *inter alia*, as follows:

> I previously wrote to you February 25, 2002 which has went unresponded and I would like to know the progress being made in the preparation of the Rule 3.850 Motion For Post-Conviction Relief. I take this time to write again because there are critical factors to be considered.
>
> First, I realize Rule 3.850 motion [sic] have a two (2) year time limit which began to run in my case August 31, 2001 (Mandate on direct appeal). However, to reserve being heard in the federal forum under 28 U.S.C. Sect. 2254, my 3.850 *must* be filed within one (1) year of the conclusion of the direct appeal. *See* 28 U.S.C. 2244(d)(2); and *Webster [sic] Moore*, 199 F.3d 1256 (11th Cir. 2000). The one (1) year will actually start however 90 days from the direct appeal "opinion" which was August 15, 2001. *See Coates v. Byrd*, 211 F.3d 1225 (11th Cir. 2000), (allowing 90 days to file Certorari, [sic] whether filed or not)
>
> So I have until *Nov. 15, 2002* to file the Rule 3.850 Motion in state court to insure timely filing for the federal court under Sect. 2254 Petition For Writ of Habeas Corpus.
>
> * * *
>
> Please keep me informed because time is of the essence and I look forward to hearing from you very soon.

Lipinski did not respond to Petitioner's May 6, 2002 letter.

On July 1, 2002, Petitioner spoke to Lipinski for the first time since he had retained him.[7] At that time, Petitioner reiterated his concerns about the one-year limitations period for federal habeas corpus review and Lipinski assured Petitioner that he would comply with that limitations period.

Petitioner did not have any communication with Lipinski again until September 25, 2002 when they had a telephone conversation. During that conversation, Petitioner again discussed the one-year limitations period governing federal habeas corpus petitions and Lipinski again assured Petitioner that he would file Petitioner's state motion for post-conviction relief in plenty of time to toll that limitations period. However, the November 13, 2002 deadline passed without Lipinski filing a motion for post-conviction relief on behalf of Petitioner and with Lipinski still retaining the file pertaining to Petitioner's case.

On November 21, 2002, Lipinski mailed a copy of a state motion for post-conviction relief to Petitioner for him to sign, notarize and mail back. On November 27, 2002, Petitioner received the motion for post-conviction relief drafted by Lipinski and wrote Lipinski a letter expressing his concern that his motion for post-conviction relief was not filed within the one-year limitations period governing federal habeas corpus petitions of state prisoners. In that letter Petitioner again noted that "[t]ime is of the essence" and asked Lipinski to contact him immediately.

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[7] Petitioner has been incarcerated since the date of the offense.

On December 9, 2002, Petitioner spoke to Lipinski on the telephone and Lipinski told Petitioner that, although the one-year limitations period governing his federal habeas corpus petition had technically expired, an affidavit from Lipinski would excuse the delay. As previously explained, Lipinski finally filed Petitioner's state motion for post-conviction relief on December 20, 2002, approximately five weeks after the one-year limitations period for filing Petitioner's federal habeas corpus petition had run.

On March 3, 2003, Petitioner wrote to Lipinski complaining about Lipinski's failure to answer his correspondence or telephone calls and failure to provide him with his previously requested file pertaining to his case. On March 28, 2003, Lipinski finally spoke to Petitioner on the telephone and again assured him that an affidavit from Lipinski would excuse the delay in tolling the one-year limitation for federal habeas corpus review.

After Petitioner's state motion for post-conviction relief was denied, Lipinski continued to represent Petitioner by filing an appeal of the denial of that motion in the state appellate court. When the state appellate court affirmed the denial of Petitioner's motion for post-conviction relief, Lipinski assured Petitioner that he would promptly prepare and file Petitioner's federal habeas corpus petition in the District Court. About five months later, on December 17, 2003, Lipinski wrote to Petitioner apologizing for the delay in filing the petition for a writ of habeas corpus in the District Court and promising to have it filed by January 2004. However, on January 26, 2004, when over five weeks passed without Lipinski filing Petitioner's federal habeas corpus petition, Petitioner wrote to Lipinski asking him to reiterate what exception to the one-year time limitation applied to Petitioner and how

that exception would be addressed by Lipinski when he filed Petitioner's petition for federal habeas corpus review. Lipinski did not respond to that letter or to multiple attempts by Petitioner's family members to contact him in January and February 2004.

On March 1, 2004, Petitioner wrote the following letter to Lipinski:

> At present I am very confused and frustrated over the breakdown of communications between you and I as well [sic] between you and my family. I have repeatedly written to you. Last time was dated January 26, 2004 and you didn't respond to any of them, also my family has repeatedly tried to contact you via phone and fax to no avail.
>
> I am alarmed over this fact because just as you were hired to do the 3.850 post conviction motion, you were also retained to handle my federal habeas corpus peticion [sic] in the Southern District Court. You told my family and myself that you would have had this in court January of 2004. Here its now March of 2004 and the federal habeas corpus has not been submitted to the court and you seemingly are refusing to communicate with me.
>
> Mr. Lipinsky, when you were initially retained I expressed my concerns and desires for all my legal avenues and trial errors to be considered and me not be deprived from any one of them because of time limitation [sic]. I certainly brought up those issues on [sic] the letter I wrote you on February 25, 2002. After no response to that letter, I wrote you again on May 6, 2002 to bring up again the same issues to your attention.

> You assured me on a conference call we had on December 9, 2002 at 1 pm that if time expire [sic] to file my federal habeas corpus, that you would provide me with a [sic] affidavit explaining to the court that it was you're [sic] fault as my attorney of record that my issues which were presented on direct appeal to the Third District Court of Appeals, were not timely file [sic] due to your neglect.
>
> * * *
>
> I get the impression that you no longer wish to represent me. My family has the same impression. If this is the case, please let me know so I can secure proper representation. Time is of the essence and I will look for you to contact me right away.

On March 4, 2004, Petitioner filed a complaint against Lipinski with the Florida Bar on the basis that Lipinski failed to file Petitioner's state motion for post-conviction relief in time to toll the one-year statute of limitations governing the filing of his petition for habeas corpus relief.[8] Finally, on March 12, 2004, long after the one-year limitations period had already expired, Lipinski sent Petitioner a proposed petition for federal habeas corpus relief.

As previously explained, on May 4, 2004, Petitioner filed a *pro se* habeas corpus petition in the District Court. Subsequently, in a "Memorandum Justifying Consideration

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[8] Petitioner's complaint against Lipinski was eventually forwarded to the Florida Bar Grievance Committee for review and consideration because Bar counsel found that "[t]here may be a possible violation of . . . Rules 4-1.3, 4-1.4, and 4-1.16(d) of the Florida Rules of Professional Conduct." It is still pending.

of Petition for Writ of Habeas Corpus" and in a "Reply to Respondent's Response" filed by Petitioner in the District Court, Petitioner described the previously-explained misconduct of his attorney in failing to toll the limitations period by timely filing his state motion for post-conviction relief in spite of his repeated directives to do so, misrepresenting to Petitioner that an affidavit from him would excuse the delay and in not supplying Petitioner with a copy of his file until after the expiration of that limitations period. Petitioner argued that this misconduct by his attorney justified the equitable tolling of that limitations period. However, the District Court ruled that, where, as in this case, a state prisoner diligently attempts to comply with the statute of limitations governing federal habeas corpus claims but his attorney's misconduct leads to the late filing of such a claim, the doctrine of equitable tolling is inapplicable and the late-filing will not be excused. (App. 5-18).

On March 17, 2005, Petitioner timely filed a notice of appeal from the District Court's Order dismissing his federal habeas corpus petition and a motion for a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c)(2) in the District Court in which Petitioner asserted that such a certificate should issue because he satisfied the element of *Slack v. McDaniel*, 529 U.S. 473 (2000) that reasonable jurors would find it debatable whether the District Court was correct in ruling that an attorney's misconduct cannot equitably toll AEDPA's statute of limitations. On April 5, 2005, the District Court entered a terse simple written order denying that motion stating that Petitioner failed to make a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2). (App. 5).

On July 6, 2005, one Circuit Judge of the Eleventh Circuit issued a simple Order denying a Certificate of Appealability on the basis that Petitioner's habeas corpus petition was "barred by § 2244's one-year statute of limitations" and that, as a consequence, the Petitioner failed to establish the element of *Slack v. McDaniel*, 529 U.S. 473 (2000) that reasonable jurors would find it debatable whether the District Court was correct in its procedural ruling. (App. 3). Petitioner timely filed a motion for reconsideration of this July 6, 2005 Order. On September 8, 2005, two Circuit Judges of the Eleventh Circuit issued an Order stating that, upon reconsideration, Petitioner's motion for a Certificate of Appealability was denied because his petition was "barred by § 2244's one-year statute of limitations" and therefore he failed to make the requisite showing required by 28 U.S.C. § 2253(c)(2) and *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted to resolve the conflict between the Second, Third, Fifth, Eighth and Ninth Circuits on the one hand and the Seventh and Eleventh Circuits, on the other hand, over whether the statute of limitations governing federal habeas corpus claims of state prisoners should be equitably tolled where a state prisoner diligently attempts to comply with that statute of limitations but fails to do so because of his attorney's misconduct.

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some

extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, ___ U.S. ___, 125 S. Ct. 1807, 1814 (2005) (citations omitted). In *Pace*, this Court noted that "[w]e have never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." 125 S. Ct. at 1814 n.8. However, at least four Justices of this Court in *Duncan v. Walker*, 533 U.S. 167 (2001), expressed the view that equitable tolling is applicable to AEDPA's statute of limitations. *See id.* at 183 (Stephens, J., joined by Souter, J., concurring) ("[N]either the Court's narrow holding, nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled . . . as a matter of equity."); *id.* at 192 (Breyer, J. joined by Ginsberg, J. dissenting) (describing the suggestion that courts employ equitable tolling under AEDPA as "sound"). The majority in *Duncan* did not deny that equitable tolling could apply; it merely stated that it had no occasion to address the issue. *See* 533 U.S. 181.

Eleven circuits have concluded that, under certain circumstances, equitable tolling of the statute of limitations in either 28 U.S.C. § 2255 for federal prisoners and/or 28 U.S.C. § 2244(d)(1) for state prisoners is possible. *See Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004); *Baldayaque v. United States*, 338 F.3d 145, 150-51 (2d Cir. 2003); *Miller v. N.J. State Dep't of Corrections*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000); *United States v. Wynn*, 292 F.3d 226, 230-31 (5th Cir. 2002); *Dunlap v. United States*, 250 F.3d 1001, 1008-09 (6th Cir. 2001); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Calderon v. United States Dist. Court*, 128 F.3d 1283, 1288-89 (9th Cir.

1997); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (*per curiam*). The D.C. Circuit has yet to decide the question. *See United States v. Pollard*, 416 F.3d 48, 56 n.1 (D.C. Cir. 2005).

The Second, Third, Fifth, Eighth and Ninth Circuits have held that an attorney's misconduct can equitably toll the AEDPA statute of limitations. *Spitsyn v. Moore*, 345 F.3d 796, 798 (9th Cir. 2003) (tolling AEDPA's statute of limitations applicable to state habeas corpus petitioner due to misconduct on the part of petitioner's attorney in failing to prepare and file a federal habeas corpus petition despite ample time to do so and in failing to comply with petitioner's request to return his file until after expiration of limitations period); *Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003) ("It is not inconsistent to say that attorney error ***normally*** will not constitute the extraordinary circumstances required to toll the AEDPA limitations period while acknowledging that at some point an attorney's behavior may be so incompetent as to render it extraordinary."); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002) (holding that petitioner's "allegation that he was deceived by his attorney into believing that a timely § 2255 motion had been filed on his behalf presents a rare and extraordinary circumstance beyond petitioner's control that could warrant equitable tolling of the statute of limitations" if petitioner reasonably relied on the attorney's misrepresentations); *United States v. Martin*, 408 F.3d 1089, 1092-95 (8th Cir. 2005) (holding that AEDPA's limitations period should be equitably tolled due to misconduct on the part of petitioner's attorney); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) (noting that claims of attorney misconduct may provide a basis for equitable

tolling), *overruled on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002). However, the Seventh Circuit in *Modrowski v. Mote*, 322 F.3d 965, 968-69 (7th Cir. 2003) rejected attorney misconduct as a basis for equitable tolling even if that misconduct is grossly negligent or willful. In addition, the Eleventh Circuit, in failing to grant the Petitioner's request for a certificate of appealability in this case, has concurred with the District Court's ruling that attorney misconduct is not grounds for equitable tolling of AEDPA's limitations period.

Petitioner contends that the Second, Third, Fifth, Eighth and Ninth Circuit Courts of Appeal have adopted the better reasoned view because they recognize that an attorney's misconduct, if it is sufficiently egregious, justifies the application of the doctrine of equitable tolling to the one-year limitations period of AEDPA.

The Eighth Circuit, in *Martin*, 408 F.3d at 1093-94, expressly acknowledged that there is a split among the Circuits on this issue. Since there is a conflict among the Circuits as to whether or not AEDPA's statute of limitations can be equitably tolled based upon attorney misconduct, this issue is ripe for review by this Court.

In the event that this Court grants this petition and holds that AEDPA's statute of limitations can be equitably tolled due to attorney misconduct, the Petitioner contends that the District Court erred in ruling to the contrary and that both the District Court and the Eleventh Circuit erred in denying his Certificate of Appealability on this issue. Indeed, as previously explained, under the law of the Second, Third, Fifth, Eighth and Ninth Circuits, the conduct of Petitioner's attorney in failing to toll AEDPA's limitations period by timely filing Petitioner's state motion

for post-conviction relief in spite of Petitioner's repeated directives to do so, in falsely misrepresenting to Petitioner that an affidavit from him would excuse the delay and in not supplying Petitioner with a copy of his file which was crucial to Petitioner timely asserting his federal habeas corpus claim should equitably toll that limitations period.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Miami, Florida
December 7, 2005

Respectfully submitted,

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305/854-9666
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-11642-I

NELSON GARCIA,

Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT
OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

(Filed Sep. 08, 2005)

Before BLACK and BARKETT, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated July 6, 2005, denying his motions for a certificate of appealability and leave to proceed *in forma pauperis*. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000); *see also Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000); *Whiddon v. Dugger*, 894 F.2d 1266, 1267 (11th Cir. 1990). Because his

petition is plainly barred by § 2244's one-year statute of limitations, appellant has failed to satisfy the second prong of *Slack*'s test.

Appellant's motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-11642-I

NELSON GARCIA,

Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT
OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

(Filed Jul. 06, 2005)

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Because his petition is plainly barred by § 2244's one-year statute of limitations, appellant has failed to satisfy the second prong of *Slack*'s test. The motion for a certificate of appealability is DENIED.

Appellant's motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Stanley F. Birch, Jr.
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 04-21088-CIV-MORENO

NELSON GARCIA,

Petitioner,

vs.

JAMES V. CROSBY, JR.,

Respondent. /

ORDER DENYING CERTIFICATE OF APPEALABILITY AND ORDER DENYING REQUEST TO PROCEED IN FORMA PAUPERIS

(Filed Apr. 5, 2005)

THIS CAUSE came before the Court upon Petitioner's Motion for Certificate of Appealability and Motion to Proceed *in Forma Pauperis* **(D.E. Nos. 21 and 22)**, filed on **March 17, 2005**.

THE COURT has considered the motions and the pertinent portions of the record, and being otherwise fully advised in the premises,

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Appellant's motion to proceed *in forma pauperis* is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th day of April, 2005.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-21088-Civ-MORENO
MAGISTRATE JUDGE P.A. WHITE

NELSON GARCIA, Petitioner, v. JAMES V. CROSBY, JR., Respondent.	:	ORDER OF DISMISSAL OF §2254 PETITION AS TIME BARRED (Filed Feb. 14, 2005)

For the reasons stated in the Report of the Magistrate Judge and upon independent review of the file, it is

ORDERED AND ADJUDGED as follows:

1. This petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 is dismissed as untimely filed pursuant to 28 U.S.C. §2244.

2. All motions not otherwise ruled upon are dismissed, as moot.

3. The case is closed.

DONE AND ORDERED at Miami, Florida this 14th day of February, 2005.

/s/ Federico A. Moreno
UNITED STATES
DISTRICT JUDGE

cc: Nelson Garcia, *Pro Se*
Meredith L. Balo, AAG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-21088-Civ-MORENO
MAGISTRATE JUDGE P.A. WHITE

NELSON GARCIA, Petitioner, v. JAMES V. CROSBY, JR., Respondent.	REPORT RE DISMISSAL §2254 PETITION AS TIME BARRED

(Filed Jan. 27, 2005)

Nelson Garcia, a state prisoner confined at Everglades Correctional Institution at Miami, Florida, has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, attacking his convictions entered in Case No. 96-18595 in the Circuit Court of the Eleventh Judicial Circuit of Florida at Miami-Dade County.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

For its consideration of the petition, the Court has the petitioner's response to an order regarding the limitations period with supporting documentary exhibits, the respondent's response to an order to show cause with multiple exhibits, and the petitioner's reply with numerous documentary exhibits.

The pertinent procedural history of this case is as follows. Pursuant to negotiated pleas of guilty, Garcia was convicted of two counts of first degree murder, armed

burglary, and attempted first degree murder.[1] (DE# 14; App. C, E). He was sentenced to multiple terms of life imprisonment. (DE# 14; App. D). Garcia prosecuted a direct appeal from his convictions, and the Florida appellate court on August 15, 2001, *per curiam* affirmed the convictions without written opinion. *Garcia v. State*, 793 So.2d 955 (Fla. 3 DCA 2001) (table). The mandate issued on August 31, 2001. (DE# 14; App. J). Approximately sixteen months later, on December. 20, 2002, Garcia challenged his pleas of guilty as involuntarily entered on various grounds by filing, through counsel, a motion for postconviction relief pursuant to *Fla.R.Crim.P.* 3.850. (DE# 14; App. K). In a detailed and thorough written order entered on May 1, 2003, the trial court denied Garcia postconviction relief on his claims. (DE# 14; App. L). Garcia, still represented by counsel, took an appeal from the trial court's ruling. (DE# 14; App. M). The denial of postconviction relief was *per curiam* affirmed without written opinion by the appellate court on July 23, 2003;

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[1] In brief, the facts of this case as revealed during the change of plea and sentence proceeding are as follow. (Transcript of proceeding conducted on June 28, 2000, at 356-64) (DE# 14; Ex. E). Prior to the subject criminal incident, there had been numerous incidents of domestic violence committed by Garcia, a former police officer, against his wife Patricia, resulting in Patricia leaving the marital home with her two children from the marriage aged eight and six. A few days after she had left the home, Garcia appeared at the home of Patricia's relative where she and the children were present with other family members. Garcia was armed with a gun and he pointed the gun at his wife, his two nieces and his children. After forcing Patricia outside of the house, he threw her to the ground and fired five shots into her throat, head and chest. Garcia's eight-year-old daughter witnessed the shooting and pleaded with Garcia to stop. Rather than do so, he turned and shot his daughter one time in the head. During the incident, Garcia pointed the gun at others in the house and his young son witnessed the murder of his mother and sister.

Garcia v. State, 851 So.2d 168 (Fla. 3 DCA 2003) (table), and the mandate issued on August 8, 2003. (DE# 14; App. O).

Approximately nine months later, on May 4, 2004,[2] Garcia came to this Court, filing the instant *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, challenging the subject convictions. In response to the order to show cause, the respondent solely asserts that this petition should be dismissed as untimely filed. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed, for the first time a one-year statute of limitations on petitions for writ of habeas corpus filed by state prisoners. *See* Antiterrorism and Effective Death Penalty Act, Pub.L. 104-132, 110 Stat. 1214 (1996). In most cases, the limitations period begins to run when the judgment becomes final after direct appeal or the time for seeking such review has expired. 28 U.S.C. §2244(d)(1)(A).[3]

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[2] The Eleventh Circuit recognizes the "mailbox" rule in connection with the filing of a prisoner's petition for writ of habeas corpus. *Adams v. U.S.*, 173 F.3d 1339 (11 Cir 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing). (Petition at 6) (DE# 1).

[3] The statute provides that the limitations period shall run from the latest of –

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(Continued on following page)

This period is tolled while a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending.[4] 28 U.S.C. §2244(d)(2). Moreover, the one-year limitations period is also subject to equitable tolling in "rare and exceptional cases." *See Helton v. Secretary for Dept. of Corrections*, 259 F.3d 1310, 1312 (11 Cir. 2001) (stating that "[e]quitable tolling can be applied to prevent the application of the AEDPA's statutory deadline when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition."), *cert. denied*, 535 U.S. 1080 (2002); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11 Cir. 1999). *See also Davis v. Johnson*, 158 F.3d 806 (5 Cir. 1998), *cert. denied*, 526 U.S. 1074 (1999).

The judgment of conviction and sentence in the underlying criminal case became final at the latest on November 13, 2001, ninety days after the convictions were affirmed on direct appeal. *Bond v. Moore*, 309 F.3d 770, 773-74 (11 Cir. 2002) (holding that when a petitioner is entitled to file a petition for a writ of *certiorari* in the United States Supreme Court, the statute of limitations

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(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §2244(d)(1).

[4] A properly-filed application, is defined as one whose "delivery and acceptance are in compliance with the applicable laws and rules governing filings," which generally govern such matters as the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. *Artuz v. Bennett*, 531 U.S. 4 (2000) (*overruling Weekley v. Moore*, 204 F.3d 1083 (11 Cir. 2000)).

under 28 U.S.C. §2244(d) does not begin to run until this 90-day window has expired) *See Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1986) (holding that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied); *Supreme Court Rule* 13.1 (providing that a petition for writ of certiorari must be filed within 90 days of the date of the entry of the judgment by a state court of last resort).

Since this federal petition for writ of habeas corpus challenging the subject convictions was not filed until May 4, 2004, well-beyond one year after the date on which the conviction and sentence became final, the petition is time-barred pursuant to 28 U.S.C. §2244(d)(1)(A) unless the limitations period was extended by properly filed applications for state post-conviction or other collateral review proceedings. 28 U.S.C. §2244(d)(2). Review of the procedural history of this case as set forth above indicates that Garcia pursued postconviction relief. He is, however, not entitled to tolling time for the period the postconviction proceedings were pending, because they were instituted after the applicable one-year limitations period had already expired. *See* 28 U.S.C. §2244(d). *See also Tinker v. Moore*, 255 F.3d 1331, 1332 (11 Cir. 2001) (holding that a state petition filed after expiration of the federal limitations period cannot toll the period, because there is no period remaining to be tolled); *Webster v. Moore*, 199 F.3d 1256, 1258-60 (11 Cir.) (holding that even properly filed state court petitions must be pending in order to toll the limitations period), *cert. denied*, 531 U.S. 991 (2000). Garcia's petition was due in this Court on or before November 13, 2002. Accordingly, as correctly asserted by the

respondent, the instant petition is untimely and is barred by the applicable limitations period.

An order was entered requiring the petitioner to state whether one or more of the statutory factors justify consideration of this petition for writ of habeas corpus. (DE# 4). The petitioner was notified that failure to demonstrate the existence of at least one of the four factors would probably result in dismissal of the petition. *Id.* Although Garcia has filed pleadings addressing the limitations issue with numerous supporting documentary exhibits, he has presented no valid justification for his failure to timely file his federal habeas corpus petition attacking the instant convictions. (Memorandum Justifying Consideration of Petition for Writ of Habeas Corpus; Reply to Respondent's Response) (DE# 8, 9, 16). Garcia essentially asserts that his late-filing should be excused based upon the doctrine of equitable tolling. *Id.* Garcia attempts to place blame for his late filing on his appointed appellate attorney and/or retained postconviction counsel. According to Garcia he was prevented from pursuing timely state postconviction relief and then federal habeas corpus relief, because (1) he had not been notified in a timely manner by appellate counsel of the affirmance of his convictions on direct appeal, (2) appellate counsel did not make available the record on appeal in a timely manner, (3) postconviction counsel did not timely pursue his Rule 3.850 motion, and (4) postconviction counsel did not pursue a timely federal habeas corpus petition, although retained to do so. *Id.*

It should first be noted that the documents provided by Garcia indicate that Garcia was advised by appellate counsel of the affirmance of his convictions on or about October 24, 2001, and Garcia then received a copy of the opinion on direct appeal, which had issued on August 15,

2001. *See* Letter from Robert Finlay, Esq. To Garcia dated October 24, 2001. (Appendix to Memorandum; Ex. B) (DE# 9). Garcia was also advised by appointed appellate counsel at that time that he had two years to pursue state post-conviction relief. *Id.* Garcia, therefore, received notice of the affirmance of his convictions approximately two months after the mandate issued on August 31, 2001. This was a time before Garcia's convictions became final for federal statute of limitation purposes and, therefore, before the limitations period began to run. The short delay in no way hindered Garcia in the timely pursuit of state postconviction relief and/or federal habeas corpus relief. The same is true regarding the alleged short-delay regarding the receipt of the record on appeal by Garcia and/or postconviction counsel.[5]

More important, even if this Court were to accept Garcia's numerous assertions in this federal habeas corpus proceeding regarding the improper actions or, at times, inaction of counsel pertaining to the pursuit of state postconviction relief and federal habeas corpus relief, such action or inaction does not excuse the delay. The same is true even though it appears from the record that Garcia might have been misled by appellate counsel and/or retained postconviction counsel regarding the applicable federal limitations period.[6] The courts have held that poor

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[5] Garcia states that he requested the record on appeal from appointed appellate counsel, but it was not available for receipt until some time in January 2002. (Petitioner's Reply at 4 and Appendix at Exhibit B) (DE# 16).

[6] In his letters to Garcia, appointed appellate counsel Finlay stated in pertinent part as follows:

> Be advised that under Florida Criminal Procedure Rule 3.850, Motion to set [sic] vacate, set aside or correct sentence has a two

(Continued on following page)

advice, even from a state-provided lawyer, or negligence on counsel's part will not establish cause to excuse the late-filing, because an attorney's negligence in general does not constitute an extraordinary circumstance sufficient to warrant equitable tolling. *Steed v. Head*, 219 F.3d 1298, 1300 (11 Cir. 2000) (holding that attorney negligence does not justify equitable tolling). *See also Majoy v. Roe*, 296 F.3d 770, 776 n. 3 (9 Cir. 2002) (holding that previous attorney allegedly making timely filing "impossible" was insufficient to trigger equitable tolling); *Miranda v. Castro*, 292 F.3d 1063, 1067-68 (9 Cir. 2002) (holding that appointed appellate counsel's letter following direct review providing the petitioner with an erroneous federal habeas deadline was not sufficient to warrant equitable tolling), *cert. denied*, 537 U.S. 1003 (2002); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9 Cir. 2001) (holding attorney's negligence in calculating the deadline for a federal habeas petition, resulting in a late filing, did not warrant equitable tolling), *cert. denied*, 535 U.S. 1055 (2002); *Harris v. Hutchinson*, 209 F.3d 325, 330-31 (4 Cir. 2000) (prisoner seeking federal habeas corpus relief claimed that he relied on his attorney's misinterpretation of section 2244(d)(1) limitations

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year limit for filing after the judgment and sentence become final. The U.S. District courts have similar time limitation rules.

(Letters to Garcia dated October 24 and November 5, 2001) (Petitioner's Appendix to Memorandum; Ex. B). Postconviction counsel Lipinski was retained in part to pursue federal habeas corpus relief, and he sent Garcia a proposed petition on or about March 12, 2004, after the one-year limitations period had already expired. *See* Letter to Garcia dated March 12, 2004, with proposed petition. (Appendix to Petitioner's Reply; Ex. F) (DE# 16). According to Garcia, he was advised by postconviction counsel that although the one-year limitation had technically expired for federal habeas corpus review, an affidavit from him would excuse the delay. (Reply at 7, 8).

period). This is especially true regarding the actions of postconviction counsel since petitioner has no statutory right to counsel in postconviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Pennsylvania v. Finley*, 281 U.S. 551 (1987); *Whiddon v. Dugger*, 894 F.2d 1266, 1267 (11 Cir. 1990).

Garcia's status as an unskilled layperson also does not excuse the delay. It is well settled that "ignorance of the law, even for an incarcerated *pro se* petitioner generally does not excuse prompt filing," because they are not considered extraordinary circumstances or external factors that may excuse the many and oftentimes complex procedural requirements a prisoner encounters when seeking federal habeas corpus relief. *See Fisher v. Johnson*, 174 F.3d 710, 714 (5 Cir. 1999), *cert. denied*, 531 U.S. 1164 (2001). *See also Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 478 (5 Cir. 1991) (holding equitable tolling of limitations period within the Age Discrimination in Employment Act was not warranted by plaintiff's unfamiliarity with legal process, his lack of representation, or his ignorance of his legal rights); *United States v. Flores*, 901 F.2d 231, 236 (5 Cir. 1993) (holding that pro se status, illiteracy, deafness and lack of legal training not external factors excusing abuse of the writ) *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 909 (9 Cir. 1986) (holding that illiteracy of *pro se* petitioner not sufficient cause to avoid procedural bar). Thus, this case presents no grounds for the application of the doctrine of equitable tolling, which is available in only rare and exceptional circumstances when an extraordinary factor beyond the petitioner's control prevents him from filing in a timely manner. *See Helton v. Secretary for Dept. of Corrections*,

259 F.3d at 1312; *Sandvik v. United States*, 177 F.3d 1269 at 1271; *Davis v. Johnson*, 158 F.3d 806.

Further, the record does not indicate that Garcia was in any way impeded by any unconstitutional State action in pursuing state postconviction relief or filing this federal petition for writ of habeas corpus. Garcia has, therefore, presented no valid justification supported by the record for his failure to timely file his federal habeas corpus petition attacking the instant convictions. The time-bar is ultimately the result of Garcia's failure to expeditiously prosecute state postconviction proceedings and then this federal habeas corpus petition. Since the claims raised by Garcia in this habeas corpus proceeding instituted on May 4, 2004, are untimely, the claims are time-barred pursuant to 28 U.S.C. §2244(d)(1)-(2) and Garcia is not entitled to review on the merits.

It is therefore recommended that this petition for writ of habeas corpus be dismissed as untimely filed pursuant to 28 U.S.C. §2244.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

SIGNED this 26th day of January, 2005.

/s/ Patrick A. White
UNITED STATES
MAGISTRATE JUDGE

cc: Nelson Garcia, *Pro Se*
DC# 199135
Everglades Correctional Institution
P.O. Box 949000
Miami, FL 33194-9000

Meredith L. Balo, AAG
Department of Legal Affairs
444 Brickell Avenue
Suite 950
Miami, FL 33131

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT
COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 2003

NELSON GARCIA,	**	
	**	
Appellant,	**	CASE NO. 3D03-1530
vs.	**	LOWER TRIBUNAL
THE STATE OF FLORIDA,	**	NO. 96-18595
	**	
Appellee.	**	

Opinion filed July 23, 2003.

An Appeal under Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Dade County, Jose Rodriguez, Judge.

John H. Lipinski, for appellant

Charles J. Crist, Jr., Attorney General, for appellee.

Before GERSTEN, GODERICH, and SHEVIN, JJ

PER CURIAM

Affirmed

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

Nelson Garcia,
Defendant

Case No. 96-18595
Section No. 19
Judge Jose Rodriguez

ORDER DENYING MOTION FOR POST CONVICTION RELIEF

(Filed May 1, 2003)

THIS CAUSE having come before this Court on the defendant, Nelson Garcia's, Motion for for Post Conviction Relief and this Court having reviewed the motion, the State's response thereto, the court files and records in this case, and being otherwise fully advised in the premises therein, hereby denies the defendant's Motion for FOR POST CONVICTION RELIEF on the following grounds:

On June 28, 2000, the defendant pled guilty to two counts of First Degree Murder, one count of Burglary with an Assault or Battery and one count Attempted First Degree Murder. The defendant is now claiming that his plea was involuntary and raises four grounds upon which he states relief can be granted. This Court will address each ground individually.

I. The defendant alleges that trial counsel, Reemberto Diaz, was ineffective by failing to request a pre-plea evaluation and therefore the plea taken by defendant was involuntary.

The defendant alleges that his plea was involuntary because the defendant had psychological evaluations two years prior to the plea and should have been examined closer in time to the plea.

The record reflects that the defendant was fully aware of the plea and its consequences. On June 27, 2000, the day before the defendant accepted the plea, the Court colloquied the defendant with regard to the plea that was offered by the state. The court told the defendant that there were several issues that needed to be discussed. The court asked the prosecutor to state the plea in open court to make sure that the defendant understood. (See Exhibit A Pg 12 through 14) The following exchange then occurred:

> COURT: Mr. Garcia, do you understand the plea that the State has offered you.
>
> DEFENDANT: Yes.
>
> COURT: The plea that they are offering you today, this will be the last time you receive this offer because once we start jury selection all offers are off and we simply proceed to trial. Do you understand that?
>
> DEFENDANT: Yes.

(See Exhibit A pg 14 through 15)

The Court then explained the terms of the plea on the record again. (See exhibit A pg 15 lines 3 through 16) then the following exchange occurred

COURT: Is that your understanding of the plea? Do you understand that that is what the offer is?

DEFENDANT: Yes

COURT: Do you understand if you are found guilty of first degree murder, that we would then proceed to a penalty phase, and it would be up to the jury to recommend an appropriate sentence; ultimately for the Court to decide what the appropriate sentence would be for first degree murder.

DEFENDANT: Yes

COURT: There are only two possible sentences for the crime of first degree murder, that is, either life in prison without the possibility of Parole or death either by electrocution or by lethal injection. Do you understand that?

DEFENDANT: Yes

COURT: Have you decided whether or not you wish to accept the State's offer

DEFENDANT: No. I don't

COURT: You wish to proceed to trial?

DEFENDANT: Yes, Ma'am

(See exhibit A Pages 15 line 15 through pg 16 line 12)

The defendant at that point clearly rejected the plea and understood the conditions the court explained to him. There was absolutely no indication that the defendant was incompetent to proceed at that time.

Moreover, on June 28, 2000 the Court presiding over the case made specific and detailed findings with regard to the defendant's competency and mental condition (See

exhibit B 364 to 379). In addition the Court asked the defendant questions about his present mental condition:

> COURT: Are you presently under the influence of any alcohol, medication or drugs?
>
> DEFENDANT: Medication
>
> COURT: What medication are you taking? I know that you are taking Sinequan and Haldol,
>
> DEFENDANT: Zoloft.
>
> COURT: And what?
>
> DEFENDANT: Zoloft.
>
> COURT: Do these medications in any way impair your ability to understand what is going on here today? In other words do you understand everything that is happening here today?
>
> DEFENDANT: Yes, Your Honor.
>
> COURT: Do the medications assist you in understanding what is going on here today?
>
> DEFENDANT: Yes, Your Honor.

(See exhibit B pg 347 line 16 through pg 348 line7).

The defendant was able to inform the court, without hesitation, what medications he was taking at the time. He is further able to tell the court that the medications assisted him in understanding the plea and the court proceedings. As further evidence of the defendant's competency, he requested that it be a condition of his plea that the competency issue be appealed to the Third District Court of Appeal and he clearly understood the court when the court explained that the Third District court of Appeal would review the competency findings (see Exhibit B pgs

354 line 10 through pg 355 line 24) Moreover, the record clearly reflects that the Court found the defendant competent to proceed. (See Exhibit C Court Docket) As to ground I the defendant has failed to state a ground upon which relief can be granted.

II. The defendant claims that his plea was involuntary due to ineffective assistance of trial counsel. He claims that trial counsel was ineffective in failing to seek a Pet or Brain Scan.

As to the second ground the defendant has failed to state a ground upon which relief can be granted for all of the reasons stated with regard to ground I. Additionally, the defendant had extensive psychological evaluations and extensive litigation with regard to his mental state and competency (See exhibit D Transcript of competency hearing held July 22, 1998 and Exhibit E, Transcript of competency hearing held October 16, 1998 and Exhibit F Transcript of Competency Hearing held November 13, 1998 and Exhibit G Transcript of competency Hearing held November 20, 1998.)

In his motion the defendant quotes Dr Jacobson at a hearing held on July 22, 1998, as saying that if the defendant suffered seizures it could indicate scarring in the brain. However, the record clearly states that there is no evidence that the defendant ever suffered seizures:

> DR. JACOBSON: Yes I don't know that it's established that he had seizures. There are other reasons, if he did have seizures, for seizures, which would be his use of alcohol or the combination of the two previous injuries and his use of alcohol could result in seizures, and he does describe drinking. Again, the amount of drinking he doesn't quantitate or didn't

quantitate for me, but it may well have been significant based upon not his estimate of the amount, but more the style and persistence of his drinking.

COURT: Is there evidence that he suffers from seizures?

MR. DELLA FERA: No, Judge, we haven't found any.

(See exhibit D PG 13 lines 2 through 22.)

At the end of that court hearing further tests were ordered for the defendant. These were tests that Dr Jacobsen thought might be helpful and the court in the abundance of caution postponed ruling until the completion of these tests (see exhibit D pgs 51 to 53). The record reflects that there was no evidence of seizures or brain damage. On November 13, 1998 after taking testimony from four doctors, the court found the defendant was competent. Therefore the defendant has failed to show that his plea was involuntary because he was incompetent. He also fails to show that there was a substantial probability that a pet scan or brain scan would have resulted in his being found incompetent to take the plea.

III. The defendant claims his plea was involuntary because his Brother in Law Confessor Gonzalez, who is a detective for the city of Miami Police Department, coerced it.

After the defendant executed his wife and eight-year-old daughter in the driveway of his sister I [sic] law's ome [sic], the defendant left the scene and was at large. The defendant's sister was married to a city of Miami Detective named Confessor Gonzalez. The Defendant contacted his brother in law after the incident and Detective

Gonzalez was able to talk the defendant into turning himself in. (see Exhibit B pg 356 through 364)

The record directly refutes the defendant's allegations that the plea was coerced.

> COURT: Have you had enough time to discuss the plea with your lawyers both Mr. Daz and Mr. Della Fera?
>
> DEFENDANT: Yes, Your Honor
>
> COURT: And have your lawyers also discussed with you, not just today, but through the preparation of your case, the testimony and evidence that the State is going to be presenting against you at trial?
>
> DEFENDANT: Yes
>
> COURT: So you are familiar with all the evidence in this case?
>
> DEFENDANT: Yes, Your Honor
>
> COURT: Have you had enough time to discuss with your lawyers the possible defenses to this case as well as any possible mitigating evidence that they might offer if you were found guilty at trial?
>
> DEFENDANT: Yes, Your Honor

(see Exhibit B pg 348 line 7 through 349 line 1)

> COURT: Is anybody forcing you to accept this plea?
>
> DEFENDANT: No, Your Honor
>
> COURT: Are you pleading guilty because based upon your review of the evidence with your lawyers, you feel that it is in your best interest and that you are guilty of these offenses?
>
> DEFENDANT: Yes Your Honor

COURT: Are you satisfied with the services of both Mr. Diaz and Mr. Dela [sic] Fera in your behalf?

DEFENDANT: Yes Your Honor

COURT: Has anyone promise you or offered you anything or told you anything different from what we have discussed here in court now?

DEFENADNT [sic]: No

(See Exhibit B pg 349 line 24 through pg 350 line 17)

The record clearly refutes the allegation that the defendant was coerced.

IV. The defendant claims that his plea was involuntary because he was incompetent at the time of the plea.

The record refutes this claim. As Previously stated, extensive evaluations were conducted upon the defendant followed by several days of competency hearings. Moreover, the Court made specific detailed findings with regard to the defendant's competency. (See exhibit B pg 364 through 380) Those findings were reviewed by the Third District Court of Appeals and affirmed. (see mandate issued April 31 2001).

ORDERED AND ADJUDGED that the Defendant's Motion for for Post Conviction Relief is hereby DENIED.

The defendant, Nelson Garcia, is hereby notified that he has the right to appeal this order to the District Court of Appeal of Florida, Third District within thirty (30) days of the signing and filing of this order.

In the event that the defendant takes an appeal of this order, the Clerk of this Court is hereby ordered to

transport, as part of this order, to the appellate court the following:

1. Defendant's Motion for Post Conviction Relief.
2. The State's response.
3. This order.

DONE AND ORDERED at Miami, Miami-Dade County, Florida, this the _____ day of _____.

/s/ Jose Rodriguez
CIRCUIT JUDGE

cc: John H. Lipinski.

I CERTIFY that a copy of this order has been furnished to the Movant, Nelson Garcia by mail this May 1, 2003.

/s/ [Illegible]
Deputy Clerk

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT
COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 2001

NELSON GARCIA,	**	
Appellant,	**	
	**	CASE NO. 3D00-2206
vs.	**	LOWER TRIBUNAL
THE STATE OF FLORIDA,	**	NO. 96-18595
Appellee.	**	

Opinion filed August 15, 2001.

An Appeal from the Circuit Court for Dade County, Michael Genden and Leslie Rothenberg, Judges.

Bennett H. Brummer, Public Defender, and Robert Finlay, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Frank Ingrassia, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J. and GODERICH and FLETCHER, JJ

PER CURIAM

Affirmed.

☒ In The Circuit Court Of The Eleventh Judicial Circuit In And For Dade County, Florida.

☐ In The County Court In And For Dade County, Florida

DIVISION	JUDGMENT	CASE NUMBER
☒ Criminal ☐ Other	☐ Probation Violator ☐ Community Control Violator ☐ Retrial ☐ Resentence	96-18595

The State of Florida vs. Nelson Garcia Plaintiff Defendant	Clock In (Filed Jul. 11, 2000)

The Defendant Nelson Garcia, being personally before this Court represented by R. Diaz & G. P. Delaferra, his attorney of record, and the State represented by E. Rubio & R. Antonacci, Assistant State's Attorney, and having:

☐ been tried and found guilty
☒ entered a plea of guilty
☐ entered a plea of nolo contendere

to the following crime(s):

Count	Crime	Offense Statute No.	Degree of Crime	OBTS No.
1 & 2	First Degree	782.04(1) &	Capital	
	Murder	775.087		
3	Armed Burglary	810.02(2)(A)	Life	
	with Assault/			
	Battery			
4	Attempted First	782.04(1)(a),	1F	
	Degree Murder	777.04 &		
		775.087		

and no cause being shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☒ In The Circuit Court Of The Eleventh Judicial Circuit In And For Dade County, Florida.

☐ In The County Court In And For Dade County, Florida.

DIVISION ☒ Criminal ☐ Other	**CHARGES/COSTS/FEES**	**CASE NUMBER** 96-18595
The State of Florida vs. Nelson Garcia Plaintiff Defendant		Clock In (Filed Jul. 11, 2000)

The Defendant is hereby ordered to pay the following sum if checked:

☒ Fifty dollars ($50.00) pursuant to F.S. 938.03 (Crimes Compensation Trust Fund).

☒ Five dollars ($5.00) as a court cost pursuant to F.S. 938.01 (1) $3.00, F.S. 938.15 $2.00 (Criminal Justice Trust & Education Funds).

☐ A fine in the sum of $_____ pursuant to F.S. 775.0835. (This provision refers to the optional fine for the Crimes compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as a part of a sentence to F.S. 775.083 are to be recorded on the Senetnce [sic] page(s)).

☐ Twenty dollars ($20.00) pursuant to F.S. 938.09 (Handicapped and Elderly Security Assistance Trust Fund).

☒ A sum of $200.00 pursuant to 938.05 (Local Government Criminal Justice Trust Fund).

☐ Restitution in accordance with attached order.

☒ Three dollars ($3.00) Juvenile Assessment Center pursuant to Dade County Ordinance 96-182, F.S. incorporating F.S. 938.17.

☐ A sum of $_____ pursuant to F.S. 27.52 (Public Defender Application Fee).

☒ A sum of $150.00 pursuant to F.S. 939.18 (Court Facilities Cost).

☐ A sum of $_____ pursuant to F.S. 938.06 (Crime Stopper's Programs).

☒ A sum of $3.00 pursuant to F.S. 938.19 (Teen Courts).

☒ A sum of $50.00 pursuant to F.S. 775.083 (Crime Prevention Programs).

Other _____

DONE AND ORDERED in Open Court in Dade County, Florida this 28th day of JUNE, 2000.

/s/ Leslie B. Rothenberg
JUDGE
LESLIE B. ROTHENBERG

* * *

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA		
CRIMINAL DIVISION	**SENTENCE (AS TO COUNT 1 & 2)**	**CASE NUMBER** 96-18595 OBTS NUMBER __
The State of Florida vs. Nelson Garcia Plaintiff Defendant		Clock In (Filed Jul. 11, 2000)

The Defendant being personally before this Court, accompanied by his attorney, R. DIAZ & G.P. DELAFERRA, and having been adjudicated guilty herein, and the Court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown and the Court having:

(Check one)

- ☐ on _____ deferred imposition of sentence until this date.
- ☐ previously entered a judgment in this case on the defendant now resentences the defendant.
- ☐ placed the defendant on Probation/ Community Control and having subsequently revoked the defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that the defendant:

- ☐ pay a fine of $_____, pursuant to F.S. 775.083, plus $_____ as the 5% surcharge required by F.S. 938.04.
- ☒ is hereby committed to the custody of the Department of Corrections.
- ☐ is hereby committed to the custody of the Sheriff of Dade County, Florida.
- ☐ is sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one; unmarked sections are inapplicable):

- ☒ for a term of Natural Life. Without parole
- ☐ for a term of _____.
- ☐ said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.
- ☐ IT IS FURTHER ORDERED that the entry of sentence be suspended as to count(s) _____ of this case.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA		
CRIMINAL DIVISION	**SENTENCE (AS TO COUNT 3 & 4)**	**CASE NUMBER** 96-18595 OBTS NUMBER __
The State of Florida vs. Nelson Garcia Plaintiff Defendant		Clock In (Filed Jul. 11, 2000)

The Defendant being personally before this Court, accompanied by his attorney, R. DIAZ & G.P. DELAFERRA, and having been adjudicated guilty herein, and the Court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown and the Court having:

☐ on _____ deferred imposition of sentence until this date.

(Check one) ☐ previously entered a judgment in this case on the defendant now resentences the defendant.

☐ placed the defendant on Probation/ Community Control and having subsequently revoked the defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that the defendant:

- ☐ pay a fine of $_____, pursuant to F.S. 775.083, plus $_____ as the 5% surcharge required by F.S. 938.04.
- ☒ is hereby committed to the custody of the Department of Corrections.
- ☐ is hereby committed to the custody of the Sheriff of Dade County, Florida.
- ☐ is sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one; unmarked sections are inapplicable):

- ☒ for a term of Natural Life.
- ☐ for a term of _____.
- ☐ said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.
- ☐ IT IS FURTHER ORDERED that the entry of sentence be suspended as to count(s) _____ of this case.

Defendant Nelson Garcia

Case Number 96-18595

If "split" sentence complete either of paragraphs

_____ Followed by a period of ___ on Probation/ Community Control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

_____ However, after serving a period of ___ imprisonment in ___, the balance of such sentence shall be suspended and the Defendant shall be placed on Probation/Community Control for a period of ___ under supervision of the Department of Corrections according to the terms and conditions of Probation/ Community Control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

SPECIAL PROVISIONS
(As to Count 1 thru 4)

by appropriate notation, the following provisions apply to the sentence imposed:

MANDATORY/MINIMUM PROVISIONS:

FIREARM:	SEMI-AUTOMATIC FIREARM OR MACHINE GUN:
X Possession	___ Possession
___ Discharged	___ Discharged
___ Discharged causing great bodily harm	___ Discharged causing great bodily harm

It is further ordered that the 3 years mandatory minimum imprisonment provisions of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.		
Drug Trafficking:	_____	It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this count.
Controlled Substance Within 1000 Feet of School:	_____	It is further ordered that the three year minimum imprisonment provisions of Florida Statute 893.13(1)(e)1, are hereby imposed for the sentence specified in this court.
Felony Offender:	_____	The defendant is adjudicated a ___ habitual violent felony offender ___ violent career criminal and has been sentenced to an extended term in accordance with the provisions of Florida Statute 775.084(4). A minimum term of ___ year(s) must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open court.
Repeat Sexual Offender:	_____	It is further ordered that the defendant shall serve a minimum of ___ years before release in accordance with Florida Statute 775.0823.
Law Enforcement Protection Act:	_____ _____	Aggravated Assault Upon Law Enforcement Officer Aggravated Battery Upon Law Enforcement Officer It is further ordered that the defendant shall serve a minimum of:

		___ 3 years provision of Florida Statute 784.07(2)(c) ___ 5 years provision of Florida Statute 784.07(2)(d)
Aggravated Assault or Battery Upon Person Over 65 Years Of Age:	_____	It is further ordered that the defendant shall serve a minimum of three years or imprisonment before release, pay a fine of $_____, complete ___ hours of community service and make restitution to the victim in accordance with Florida Statute 784.08.
Capital Offense:	_____	It is further ordered that the Defendant shall serve no less than 25 years in accordance with Florida Statute 775.082(1).
Prison Release Reoffender:	_____	The defendant is adjudicated a Prison Release Reoffender and has been sentenced to a maximum term in accordance with the provision of Florida Statute 775.082(8). It is further ordered that the Defendant shall not be released until the expiration of the sentence.
OTHER PROVISIONS		
Retention of Jurisdiction	_____	The Court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).
Jail Credit	__X__	It is further ordered that the Defendant shall be allowed a total of 1476 days as credit for time incarcerated prior to imposition of this sentence.

Prison Credit	____	It is further ordered that the Defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.
Consecutive/ Concurrent As To Other Counts	X	It is further ordered that the sentence imposed for count(s) 1 thru 4 shall run (check one) ☐ consecutive to ☒ concurrent with the sentence set forth in count(s) 1 thru 4 of this case.
Consecutive Concurrent As To Other Convictions	____	It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ☐ consecutive to ☐ concurrent with the following: ____ Any active sentence being served. ____ Specific sentences: _____ _____
Blood Sample Required	____	It is further ordered, pursuant to section 943.325, Florida Statutes, that the defendant, having been convicted of an attempt or offense under section 794 (sexual battery), 800 (lewdness or indecent exposure), 782.04 (murder), 784.045 (aggravated battery), 812.133 (car jacking), or 812.135 (home invasion robbery) shall be required to submit blood specimens.

In the event the above sentence is to the Department of Corrections, the Sheriff of Dade County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the Department together with a copy of this Judgment and Sentence and any other documents specified by Florida Statutes.

The defendant in Open Court was advised of his right to appeal from this sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

In imposing the above sentence, the Court further recommends

DONE AND ORDERED in Open Court at Dade County, Florida, this 28th day of JUNE, 2000.

/s/ Leslie B. Rothenberg
JUDGE
LESLIE B. ROTHENBERG